

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>95-10639</u>
HERCULES PELZER)	
)	
Debtor)	
_____)	
)	
HERCULES PELZER)	FILED
)	at 3: 0'clock & 20 min. P.M.
Plaintiff)	Date: 2-25-98
)	
vs.)	Adversary Proceeding
)	Number <u>97-01024A</u>
UNITED COMPANIES FINANCIAL CORP.,)	
A Louisiana Corporation and)	
UNITED COMPANIES LENDING CORP.,)	
A Louisiana Corporation)	
)	
Defendants)	

ORDER

By order filed February 11, 1998 I denied the plaintiff's request for enlargement of time by twenty (20) days for the filing of a notice of appeal of the final order issued in this adversary proceeding January 22, 1998 and entered January 23, 1998. I found that the ten-day period for the filing of a notice of appeal or a request for extension of time to file the notice expired on February 2, 1998. The plaintiff's request was filed with the court on

February 5. The denial of the motion for extension of time to file notice of appeal was without prejudice against plaintiff's filing a late request for extension of time upon showing of excusable neglect.

In response to the order by letter filed February 12, 1998, taken as a request for reconsideration, plaintiff challenges my determination that the request for extension of time was late filed. According to plaintiff's attorney, he acted "on the presumption that the provisions of Rules 6(a) and 6(b) of the Federal Rules of Civil Procedure would govern [as to calculation of time and its enlargement], whereby for periods of 'less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be included in the computation'" Under that computation, counsel asserts that his request was timely. Counsel recognizes under Federal Rule of Bankruptcy Procedure (FRBP) 9006(b) that the formula for exclusion of Saturdays, Sundays and legal holidays in the computation of time applies to "less than eight days" as compared to less than eleven days in the Federal Rules. However, he contends that the language of FRBP 9006(a)

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules. . . .

supports his view that in computing the ten-day period for the filing of a request for an extension of time to file notice of

appeal pursuant to FRBP 8002 intervening Saturdays, Sundays or legal holidays should not be counted.

In counting days under Rule 8002(a), intermediate Saturdays, Sundays and legal holidays are included in the computation. Rule 9006(a) provides in part: 'When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.' Because the appeals period is ten days, such intervening days are included.

Collier on Bankruptcy, ¶8002.04, at 8002-7 (15th ed. Rev. 1997).

Collier also addresses counsel's contention that FRBP 9006(a) permits a different computation.

The 1991 Amendment to subdivision (a) of Rule 9006 added the following phrase to the first sentence of that subdivision: 'or by the Federal Rules of Civil Procedure made applicable by these rules.' The Advisory Committee Note states that the insertion was made because 'as a result of the 1989 amendment to this Rule, the method of computing time under subdivision (a) is not the same as the method of computing time under Rule 6(a)' of the Federal Rules. For example, Bankruptcy Rule 9023 provides that 'Rule 59 F.R.Civ.P. applies in cases under the Code, except as provided by Rule 3008.' Federal Rule 59(b) provides that 'a motion for a new trial shall be served not later than ten days after the entry of judgment.' Because the ten days are to be computed in accordance with Rule 9006(a), intermediate Saturdays, Sundays and legal holidays are not excluded from the computation. However, under Federal Rule 6(a), they would be. The subdivision provides: 'when the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. The 1991 Amendment to the rule

was meant to dispel any confusion, and to ensure that Rule 9006(a) applied to such motions. This change was made necessary because the 1989 amendments to Rule 9006(a) reduced from eleven to eight days the time with respect to which intermediate Saturdays, Sundays and legal holidays would be excluded from the count.

Collier on Bankruptcy, ¶9006.02[2], at 9006-7 to 9006-8 (15th ed. Rev. 1997).

The Eleventh Circuit Court of Appeals has addressed the conflict between FRBP 9006(a) and FRCP 6(a).

Bankr. R. 9006(a), rather than Fed.R.Civ.P. 6(a), controls the computation of time for this ten-day filing deadline. Under Bankr. R. 9006(a), intermediate Saturdays, Sundays and legal holidays are excluded from computation when the time period is less than eight days; in contrast Fed.R.Civ.P. 6(a) excludes such days when the time period is less than eleven days. The Federal Rules of Civil

Procedure, however, dictate that the Bankruptcy Rule should override the Civil Rules in bankruptcy cases. Fed.R.Civ.P. 81(a)(1) (These rules . . . do not apply to proceedings in bankruptcy . . ., except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States.) See also In re P.T. Eichelberger, 943 F.2d 536, 538 (5th Cir. 1991).

In re Southeast Bank Corp., 97 F.3d 476, 478 (11th Cir. 1996).

Plaintiff's request was late filed. Reconsideration is ORDERED denied.

As a fall back position, counsel requests that

[i]f the above is seen by the Court as being an erroneous impression on my part, or as some misconception of rules interplay, I would respectfully asked the Court to treat this misimpression as "excusable neglect" and grant the request for enlargement of time on that basis.

Counsel's request, filed February 12, 1998, taken as a request to extend the time for filing a notice of appeal based upon an allegation of excusable neglect pursuant to FRBP 8002(c)(2), opposing counsel is afforded twenty (20) days from the date of this order to file a written response.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 25th day of February, 1998.